

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

**SUMMARY ORDER**

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov/)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals  
for the Second Circuit, held at the Daniel Patrick Moynihan  
United States Courthouse, 500 Pearl Street, in the City of  
New York, on the 4<sup>th</sup> day of September, two thousand eight.

**PRESENT:**

HON. JOSÉ A. CABRANES,  
HON. BARRINGTON D. PARKER,  
HON. RICHARD C. WESLEY,  
*Circuit Judges.*

**ZIDE JIANG,**  
*Petitioner,*

**v.**

**MICHAEL B. MUKASEY, ATTORNEY GENERAL,**  
*Respondent.*

08-0273-ag  
NAC

**FOR PETITIONER:** Gary J. Yerman, New York, New York.

1     **FOR RESPONDENT:**                   **Gregory G. Katsas, Acting Assistant**  
2   **Attorney General, Terri J. Scadron,**  
3   **Assistant Director, Kathryn L.**  
4   **Deangelis, Attorney, Office of**  
5   **Immigration Litigation, U.S.**  
6   **Department of Justice, Washington,**  
7   **D.C.**  
8

9             UPON DUE CONSIDERATION of this petition for review of a  
10    decision of the Board of Immigration Appeals ("BIA"), it is  
11    hereby ORDERED, ADJUDGED, AND DECREED, that the petition for  
12    review is DENIED.

13            Petitioner Zide Jiang, a native and citizen of the  
14    People's Republic of China, seeks review of a December 26,  
15    2007 order of the BIA affirming the February 10, 2006  
16    decision of Immigration Judge ("IJ") Sandy K. Hom denying  
17    petitioner's application for asylum, withholding of removal,  
18    and relief under the Convention Against Torture ("CAT"). *In*  
19    *re Zide Jiang*, No. A98 560 564 (B.I.A. Dec. 26, 2007), *aff'g*  
20    No. A98 560 564 (Immig. Ct. N.Y. City, Feb. 10, 2006). We  
21    assume the parties' familiarity with the underlying facts  
22    and procedural history of the case.

23            As a preliminary matter, because Jiang has failed to  
24    challenge the agency's denial of CAT relief before this  
25    Court, and because addressing this argument does not appear  
26    to be necessary to avoid manifest injustice, we deem any

1 such argument waived. See *Yueqing Zhang v. Gonzales*, 426  
2 F.3d 540, 541 n.1, 545 n.7 (2d Cir. 2005).

3 When the BIA does not adopt the decision of the IJ to  
4 any extent, we review only the decision of the BIA. See *Yan*  
5 *Chen v. Gonzales*, 417 F.3d 268, 271 (2d Cir. 2005); *Jin Yu*  
6 *Lin v. U.S. Dep't of Justice*, 413 F.3d 188, 191 n.4 (2d Cir.  
7 2005). We review *de novo* questions of law and the  
8 application of law to undisputed fact. See, e.g., *Tanov v.*  
9 *INS*, 443 F.3d 195, 198 (2d Cir. 2006). We review the  
10 agency's factual findings under the substantial evidence  
11 standard. See 8 U.S.C. § 1252(b)(4)(B); see also *Manzur v.*  
12 *U.S. Dep't of Homeland Sec.*, 494 F.3d 281, 289 (2d Cir.  
13 2007).

14 We find no error in the BIA's determination that  
15 Jiang's wife's forced abortion and sterilization do not  
16 constitute past persecution as to Jiang. As we have held,  
17 "the statutory scheme unambiguously dictates that applicants  
18 can become candidates for asylum relief only based on  
19 persecution that they themselves have suffered or must  
20 suffer." *Shi Liang Lin v. U.S. Dep't of Justice*, 494 F.3d  
21 296, 309 (2d Cir. 2007) (en banc); see also *Matter of J-S-*,  
22 24 I. & N. Dec. 520, 521 (A.G. 2008). Accordingly, to the

1 extent Jiang's petition for review is based on his wife's  
2 forced abortion and sterilization, it "is doomed." See *Shu*  
3 *Wen Sun v. BIA*, 510 F.3d 377, 381 (2d Cir. 2007); *Gui Yin*  
4 *Liu v. INS*, 508 F.3d 716, 723 (2d Cir. 2007).

5 Even where an applicant has not suffered a forced  
6 abortion or sterilization, he or she may still establish  
7 eligibility for relief based on his or her own resistance to  
8 a family planning policy. 8 U.S.C. § 1101(a)(42)(B). Here,  
9 the BIA found Jiang ineligible for asylum or withholding of  
10 removal based on his wife's forced abortion and  
11 sterilization. Jiang argues that the BIA erred in finding  
12 that he had not demonstrated "other resistance" to a  
13 coercive population control program because the BIA may not  
14 make findings of fact or engage in *de novo* review of the  
15 IJ's factual findings. This argument is entirely without  
16 merit as it mischaracterizes the record. Contrary to  
17 Jiang's arguments, the BIA never considered whether Jiang's  
18 evidence demonstrated resistance to a coercive population  
19 control program. Instead, the BIA only found that Jiang was  
20 not eligible for asylum and withholding of removal based on  
21 his wife's past mistreatment.

22 Jiang also argues that this Court should remand his

1 case to the agency for it to determine whether he  
2 demonstrated past persecution or a well-founded fear of  
3 persecution due to his "other resistance" to China's family  
4 planning policy. However, because Jiang never made such a  
5 claim before the agency, it is unexhausted and we will not  
6 review it in the first instance or order the BIA to do so.  
7 *Lin Zhong v. U.S. Dep't of Justice*, 480 F.3d 104, 119-20 (2d  
8 Cir. 2007). Jiang contends that he never raised an other  
9 resistance claim before the agency because, at the time he  
10 filed his application, his wife's forced abortion and  
11 sterilization alone demonstrated eligibility for relief.  
12 Such argument is unavailing where since 1996, asylum  
13 applicants have been able to establish eligibility for  
14 relief based on an other resistance claim. See Illegal  
15 Immigrant Reform and Immigrant Responsibility Act  
16 § 601(a)(1), 110 Stat. At 3009-689 (amending 8 U.S.C.  
17 § 1101(a)(42)). That Jiang elected to pursue another avenue  
18 for relief does not excuse his failure to exhaust another  
19 potentially viable claim. *Cf. Gui Yin Liu*, 508 F.3d at 723.  
20 Thus, because Jiang failed to establish any facts or raise  
21 any arguments before the agency with respect to his other  
22 resistance claim, and because the Government has raised this

1 failure to exhaust in its brief to this Court, we decline to  
2 consider this issue. See *Lin Zhong*, 480 F.3d at 124.  
3 Because Jiang advances no other arguments, this failure to  
4 exhaust is dispositive to his petition for review.

5 For the foregoing reasons, the petition for review is  
6 DENIED. As we have completed our review, any stay of  
7 removal that the Court previously granted in this petition  
8 is VACATED, and any pending motion for a stay of removal in  
9 this petition is DISMISSED as moot. Any pending request for  
10 oral argument in this petition is DENIED in accordance with  
11 Federal Rule of Appellate Procedure 34(a)(2), and Second  
12 Circuit Local Rule 34(b).

13 FOR THE COURT:  
14 Catherine O'Hagan Wolfe, Clerk  
15

16  
17 By: \_\_\_\_\_